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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO AND CHARLES BISHOP SMITH, WITNESSES BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 12–19) is reported at 442 F. 2d 276.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1971. On June 14, 1971 the court of appeals denied a petition for rehearing with suggestion for rehearing en banc (App. B, *infra*, pp. 20–21). On July 8, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and

including August 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment bars compelling a grand jury witness to furnish the grand jury a voice exemplar for comparison with exhibits consisting of recordings of lawfully intercepted wire communications.

STATEMENT

The Special February 1971 Grand Jury in the Northern District of Illinois is investigating illegal gambling. It has received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. (Supp. V) 2518, authorizing interception of wire communications.

The grand jury subpoenaed approximately twenty persons, including respondents Smith and Dionisio, and sought to obtain from them voice exemplars for identification purposes. Each witness was informed that he was a potential defendant in a matter being investigated by the grand jury. Each was asked to examine a transcript of a recording of an authorized intercepted communication and to go to a nearby room and read the transcript into a telephone connected to a recording device.[1] Smith and Dionisio appeared on separate days; each refused to give a voice exemplar, one asserting a Fifth Amendment privilege and the other asserting rights under both the Fourth and Fifth Amendments. (App. A, *infra*, pp. 12–13.)

[1] The witnesses were to give the exemplars outside the grand jury room, so that they could have their lawyers present. App. A., *infra*, p. 13.

Separate petitions were then filed in the district court seeking orders directing respondents to furnish voice exemplars for comparison with the recordings. Following a hearing, the district court ordered them to furnish the exemplars.[2] Both respondents subsequently refused to do so. The district court adjudged them guilty of civil contempt, and committed them to prison until they obeyed its order or the grand jury term expired (App. D and E, *infra*, pp. 25–28).

The court of appeals reversed (App. A, *infra*). It rejected the claim that the grand jury's request for the voice exemplars violated respondents' rights under the Fifth and Sixth Amendments, but concluded that to compel compliance with the request would violate their Fourth Amendment rights. In the court's view, the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars" (App. A, *infra*, p. 17). The court held that this "seizure" of physical evidence contradicted the "standard of reasonableness" required by the Fourth Amendment, as recently construed in *Davis* v. *Mississippi*, 394 U.S. 721. Equating the grand jury's procedure to the police arrests involved in *Davis*, the court concluded that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes

[2] The district court rejected the claims made by a number of the witnesses in a memorandum opinion dated February 19, 1971 (App. C, *infra*, pp. 22–24).

of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*" (id. at p. 19).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the proper application of the Fourth Amendment in the context of grand jury proceedings. The decision below greatly expands the protections afforded by the Fourth Amendment in such procedings, by requiring that a grand jury request for physical evidence from a witness subpoenaed before it must meet the same test of "reasonableness" as that applicable to police arrests. This holding is in sharp conflict with the essential function of the grand jury, and will seriously interfere with the broad investigatory powers heretofore exercised by it. Moreover, the decision is not necessary to safeguard the protected rights of a witness before the grand jury. In the circumstances, review of such an important decision by this Court is appropriate.

1. The grand jury is, of course, established in the Constitution "as the sole method for preferring charges in serious criminal cases," thus indicating "the high place it [holds] as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362. As the "great historic instrument of lay inquiry into criminal wrongdoing" (*United States* v. *Johnson*, 319 U.S. 503, 512), it serves not only as an accusatory body, but also as "an important safeguard to the citizen against open and public accusations of crime." *Hannah* v. *Larche*, 363 U.S. 420, 499 (Douglas, J., dis-

senting). As this Court observed many years ago in *Blair* v. *United States*, 250 U.S. 273, 282:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. * * *

This broad investigative power entitles the grand jury to investigate on its own initiative, and gives it the right and indeed the duty to pursue all leads and examine all witnesses to find if a crime has been committed. See *Hannah* v. *Larche, supra; United States* v. *Stone*, 429 F. 2d 138, 140 (C.A. 2); *United States* v. *Winter*, 348 F. 2d 204, 208 (C.A. 2), certiorari denied, 382 U.S. 955. It need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless. Witnesses before it are "not entitled to set limits to the investigation that the grand jury may conduct." *Blair* v. *United States*. In short, the grand jury need not have probable cause to investigate; rather its function is to determine if probable cause exists. As this Court said in *Hale* v. *Henkel*, 201 U.S. 43, 65: "It is impossible to conceive that * * * the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object

of the examination is to ascertain who shall be indicted."

Necessarily, this power carries with it the right to obtain testimony and evidence from the witnesses appearing before the grand jury. Giving testimony and evidence to the grand jury "are public duties which every person * * * is bound to perform upon being properly summoned." *Blair* v. *United States, supra,* 250 U.S. at 281. While this duty is subject to exceptions in limited circumstances (*ibid.*), society's interests ordinarily are best served by a thorough and extensive investigation. *Wood* v. *Georgia,* 370 U.S. 375, 392; *Hannah* v. *Larche, supra,* 363 U.S. at 499 (Douglas, J., dissenting).

2. The holding of the court of appeals that a grand jury request that a witness furnish physical evidence directly connected to the matter under investigation must satisfy the reasonableness test applicable to police arrests breaks with all precedent.

To be sure, this Court has recognized in carefully limited circumstances that the grand jury process may impermissibly infringe Fourth Amendment rights. See, *e.g., Hale* v. *Henkel,* 201 U.S. 43. That case and its progeny dealt with the production of documents under a subpoena *duces tecum,* and stand for the proposition that seizure of evidence may constitute an unreasonable search violative of the Fourth Amendment if the subpoena is overbroad. As the court below noted, the rationale for those decisions "is that general fishing expeditions into the private affairs of witnesses" unreasonably invade their right of privacy

(App. A, *infra*, p. 16). This situation has little in common with the present case, where the "invasion" of respondents' privacy is exceedingly narrow—only voice exemplars are sought. Like fingerprinting, this "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search," and is "an inherently more reliable and effective crime-solving tool." *Davis* v. *Mississippi*, *supra*, 394 U.S. at 727. And it is a "general fishing expedition" only in the sense that every grand jury proceeding is, as a result of that body's broad mission to ferret out the facts without knowing in advance of what is involved or where its investigation will lead. To compel respondents to furnish the exemplars sought here would not, in our view, be an "unreasonable" invasion of their right to privacy. Compare *Schmerber* v. *California*, 384 U.S. 757, 771.[3]

It is the essence of the grand jury proceeding to question and obtain evidence from a witness in circumstances that would not permit detaining him under any traditional probable cause standard. In this respect, of course, the grand jury's powers exceed those of most investigatory bodies, including the police; but this is necessarily so, we think, in view of the fact that the ultimate purpose of the grand jury is to determine if probable cause exists. Thus, the absence of probable

[3] Significantly, a witness subjected to an overbroad subpoena is not, under the *Hale* v. *Henkel* rationale, left free to ignore completely the grand jury's request. Instead, the correct remedy is to modify the subpoena by excising from it the overbroad and unduly burdensome elements; the witness must then comply with the modified subpoena. Cf. *United States* v. *Ryan*, No. 758, O.T. 1970, decided May 24, 1971.

cause is to be expected, and does not make unreasonable the action ordering the exemplars here.

The court's reliance on *Davis* v. *Mississippi* is misplaced. *Davis* held that the Fourth Amendment was violated when the police obtained fingerprints during an extended involuntary detention not based on probable cause or on a judicial order. The court below considered that the procedure here for obtaining exemplars "has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*" (App. A, *infra*, p. 19). But we perceive no basis for equating the two. The grand jury's investigation of possible criminal activity is not limited by restrictions customarily applicable to other authorities; and the carefully circumscribed subpoena in this case, seeking only voice exemplars to compare with exhibits, is wholly different from the unjustified detention by the police in *Davis*. Unlike the suspect in *Davis*, respondents would not be taken into custody or removed from their normal mode of life. The inconvenience to them in performing their "civic duty" before the grand jury would be minimal, and that inconvenience is no greater than the inconvenience of giving testimony, which the grand jury clearly has the power to compel. The taking of a voice exemplar is not a "search" or "seizure," any more than the giving of testimony is a search or seizure.

In *Davis*, the Court noted that it was "arguable" that because of the unique nature of the evidence involved there (fingerprints), even a police detention "might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even

though there is no probable cause in the traditional sense" (394 U.S. at 727). Voice exemplars are a similar kind of evidence. And the method by which the exemplars would be obtained here was "narrowly defined" to minimize the intrusion into respondents' private affairs, involving no detention at all. Thus, even under the *Davis* test, compelling the exemplars would not violate respondents' Fourth Amendment rights. See also *Gilbert* v. *California,* 388 U.S. 263, 266-267, where the Court, in dealing with "a handwriting exemplar," said it was "like the voice or body itself," and was "an identifying * * * characteristic" outside the protection of the Fifth Amendment.

3. The holding in this case, if not corrected by this Court, threatens to impede the grand jury's performance of its traditional function, by unduly limiting its right to obtain voice exemplars. In essence, it would require the government to litigate the question of "reasonableness" before enforcement of a grand jury subpoena seeking this type of evidence. Such litigious interruptions of the grand jury process have long been discouraged by this Court. See, *e.g., United States* v. *Ryan,* No. 758, O.T. 1970, decided May 24, 1971; *Di Bella* v. *United States,* 369 U.S. 121; *Cobbledick* v. *United States,* 309 U.S. 323. Moreover, the rationale of the court's decision is not confined to voice exemplars, but would apply as well to other physical evidence of a similar nature, such as handwriting exemplars or fingerprints, compare *United States* v. *Doe,* 405 F. 2d 436 (C.A. 2), and its logic would also extend to any time a witness is subpoenaed before a grand jury or requested to bring in books

and records, since any such subpoena necessarily involves some interference with the individual's right of privacy.

Judicial scrutiny of this sort, with the resulting delays and impediments to grand jury proceedings, is unnecessary to safeguard the witnesses' protected rights. To be sure, respondents are suspects in the grand jury proceedings here, and their exemplars may increase the risk they run of being charged with an offense. But respondents have no protected right to be free from indictment; the risk they run in this regard is no different from that of any citizen. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States, supra,* 309 U.S. at 325. Rather, the court below sought to protect respondents' right of privacy, and to bar "wholesale intrusions" upon that right by reason of grand jury subpoenaes (App. A, *infra,* p. 18). In this case, however, as we have argued above, there would be little if any "intrusion" into respondents' private affairs under the procedure envisaged. And that procedure was designed to safeguard respondents' other rights as well, by providing that the exemplars would be given outside the grand jury room so that counsel could be present.[4]

[4] The fact that a number of witnesses were asked to use the procedure set up by the grand jury did not produce any "dragnet effect" (App. A, *infra,* p. 19) or make the procedure unreasonable as to respondents. The number of persons involved is not, by itself, determinative. Insofar as a right of privacy can be founded on the Fourth Amendment, it is a

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
WM. TERRY BRAY,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
Attorney.

AUGUST 1971.

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personal right, and turns on the oppressiveness of the action complained of to the individual. *Wong Sun* v. *United States*, 371 U.S. 471; *Alderman* v. *United States*, 394 U.S. 165. If an individual were repeatedly ordered to appear before a grand jury and give voice exemplars, that might involve oppression that would be analogous to an overbroad subpoena. Of course, that does not resemble the situation here, where each individual has been asked only to give one voice exemplar at a reasonable time and place.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

(Nos. 71–1155, 71–1157)

[In Re Antonio Dionisio and Charles Bishop Smith, Witnesses Before the Special February 1971 Grand Jury]

ANTONIO DIONISIO AND CHARLES BISHOP SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

MARCH 25, 1971

SWYGERT, *Chief Judge,* FAIRFIELD and KERNER, *Circuit Judges.*

PER CURIAM. This is an appeal by Antonio Dionisio and Charles Bishop Smith from separate orders finding them in contempt of court and committing them to custody for failing to furnish voice exemplars to the Special February 1971 Grand Jury for the Northern District of Illinois.

On February 17 and 19, 1971, Dionisio and Smith, having been called before the grand jury and advised that they were potential defendants in its investigations, refused the jury's request that they furnish voice exemplars which would be compared with voices

contained on Federal Bureau of Investigation tape recordings of telephone messages intercepted pursuant to a court-ordered wiretap.

On February 19 (Dionisio) and February 23 (Smith), the district court ordered that the two witnesses:

> furnish before and to the SPECIAL FEBRUARY 1971 GRAND JURY of the United States District Court for the Northern District of Illinois, or to any duly appointed agent of said Special Grand Jury, such exemplars of respondent's voice as the said Special Grand Jury deems necessary.

The manner in which it was proposed to take these voice exemplars is as follows. The witness would be taken to an office of the United States Attorney and would be requested by FBI agents to read from a transcript of the conversations which the FBI had recorded earlier pursuant to the court-ordered wiretap and with which the witness' voice was to be compared. While reading from this transcript, the witness would speak into a telephone and his voice would be recorded on a machine operated by other FBI agents in some other room in the building. The witnesses would be permitted to have their counsel present at the United States Attorney's office where the scripts were to be read.

Both Dionisio and Smith refused to furnish the requested voice exemplars; and on February 22 (Dionisio) and February 23 (Smith), they were committed for contempt for their refusal to comply with the district court's order. Dionisio and Smith filed notices of appeal on February 23.

The district court, having determined that the appeals were frivolous and taken for delay, refused the witnesses' motions to set bail or to stay the com-

mitment order pending appeal. *See* 28 U.S.C. § 1826(b). On the witnesses' emergency motions, this court found the constitutional questions raised too substantial to justify characterizing the appeals as frivolous and ordered the witnesses admitted to bail.

Appellants contend that the procedure attempted by the grand jury violated their fifth amendment privilege against self-incrimination. This is not the law. *United States* v. *Wade*, 388 U.S. 218, 222–23 (1967); *cf. Gilbert* v. *California*, 388 U.S. 263, 265–67 (1967), and *Schmerber* v. *California*, 384 U.S. 757, 764 (1966). They further contend that the procedure violated their sixth amendment right to counsel. That contention is also without merit, particularly in view of the option extended to the appellants under which their attorneys would be permitted to be present. *Cf. Gilbert* v. *California*, 388 U.S. 263, 267 (1967).[1]

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[1] These arguments do point out the extent of the Government's involvement in the grand jury's processes. The parties did not brief this troublesome point, and no authority which would justify the grand jury's assumption of power to appoint agents has been cited to us. The fifth amendment's grand jury requirement is "a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused. . . ." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). Delegation of the power to receive subpoenaed evidence raises the question whether the grand jury function would be subverted by requiring the production of voice exemplars before FBI agents stationed in the office of the United States Attorney. This court has indicated that a grand jury might turn over subpoenaed evidence to experts, including government agents, so that those persons might examine the evidence and report on it to the grand jury. *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956). But that holding does not go so far as to authorize the jury to require a witness to report directly to government agents for examination or for the purpose of turning over evidence which is recorded and retained by the Govern-

Appellants also urge that the compelled production of voice exemplars for the grand jury upon its subpoena violates their rights under the fourth amendment. This argument raises an important and seemingly novel question.

It is now settled that the fourth amendment is applicable to the grand jury process. *Hale* v. *Henkel,* 201 U.S. 43 (1906). That case dealt with the production of documents under a subpoena duces tecum. The Court believed that a grand jury "order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Id.* at 76. Applying the test of reasonableness, the Court held the subpoena to be overbroad, stating that, "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." *Id.* at 77.

Since *Hale* v. *Henkel,* courts have struck down grand jury subpoenas which were unreasonable under the fourth amendment. *Schwimmer* v. *United States,* 232 F.2d 855 (8th Cir.) *cert. denied,* 352 U.S. 833 (1956); *see Application of Linen Supply Cos.,* 15 F.R.D. 115 (S.D.N.Y. 1953). As stated in *Application of Certain Chinese Family Benevolent & Dist. Ass'ns,* 19 F.R.D. 97, 99 (N.D. Cal. 1956), the grand jury's subpoena power "must not be so exercised as to impinge upon the prohibition against unlawful searches and seizures."

It may be argued that the fourth amendment applies only to overbroad grand jury subpoenas calling for

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ment. Since we have determined that the judgment of the district court must be reversed on other grounds, we need not attempt, in this case, to delineate the proper boundaries of the grand jury's authority to delegate certain tasks to government agents. Accordingly, we do not decide whether the deputization of the FBI attempted here was improper.

documentary evidence.[2] We do not believe the fourth amendment's application to proceedings before a grand jury is that limited. The rationale for striking down overbroad subpoenas is that general fishing expeditions into the private affairs of witnesses violate the reasonableness requirement of the fourth amendment. Compelling a person to furnish an exemplar of his voice is as much within the scope of the fourth amendment as is compelling him to produce his books and papers.

The Government argues that it is premature to consider these fourth amendment claims because the witnesses' remedy, if any, lies in the exclusion of the evidence at trial if one ultimately ensues. The argument is not persuasive for it appears to be founded on the premise that the grand jury may for its own purposes compel production of evidence in violation of the fourth amendment.

The record shows that the instant grand jury is investigating possible violations of federal criminal statutes relating to gambling and that pursuant to its investigation it has received in evidence voice recordings which were obtained under orders issued by the district court pursuant to 18 U.S.C. § 2518. Since the Government was apparently unable to identify some or all of the voices recorded, the grand jury seeks to obtain voice exemplars from those whom the Government suspects of having participated in the recorded conversations. The interception order is not part of the record nor has it been furnished to appellants. The Government does not claim that the order named Smith or Dionisio or was based on probable cause for belief that either was committing, had committed, or

[2] *See In re Dymo Industries, Inc.*, 300 F. Supp. 532 (N.D. Cal.), *aff'd*, 418 F.2d 500 (9th Cir. 1969), *cert denied*, 397 U.S. 937 (1970).

was about to commit an offense enumerated in 18 U.S.C. § 2516, or that the facilities involved were leased to, listed in the name of, or commonly used by either of them. Thus, we do not reach the question whether compulsion to furnish voice exemplars is the ultimate permissible step in the invasion of someone's privacy authorized by the antecedent interception order and whether the probable cause underlying the order makes such compulsion reasonable. For all that appears, Smith and Dionisio may be persons who were suspected of being the other parties to conversations with individuals whose privacy the Government had obtained the right to invade, thus being persons whose privacy was still constitutionally protected.

We believe the proposition to be clearly established that under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure. *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Boyd* v. *United States,* 116 U.S. 616 (1886). It is evident that the grand jury is seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars.[3] The issue we must decide is thus narrowed to a determination of whether the interposition of the grand jury between the witnesses and the Government eliminates the fourth amendment protection which would otherwise bar the Government's obtaining the evidence.

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[3] We note that the Government in its petition for enforcement described compliance with the grand jury's demand for the exemplars as "essential and necessary to [its] investigation . . . as a standard of comparison in order to determine whether or not [Smith or Dionisio] is the person whose voice was intercepted pursuant to [the court-ordered wiretap]."

The Government and appellants assert that whether the fourth amendment bars the procedure here attempted is really a question of whether probable cause must exist for the compelled production of physical evidence by a grand jury. The fourth amendment, however, not only proscribes the issuance of warrants without probable cause—a proscription not applicable here because no warrant was involved—but also prohibits searches and seizures which are unreasonable. It is the proper application of the standard of reasonableness to seizures in the grand jury context with which we must be concerned.

In *Davis* v. *Mississippi, supra,* the police detained and fingerprinted a large number of Negro youths in their investigation of an alleged rape where the assailant was described only as a Negro youth. The Supreme Court invalidated a conviction deriving from the use of fingerprints so obtained. Ruling that such an investigatory technique constitutes an unreasonable seizure under the fourth amendment, the Court said:

> Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." 394 U.S. at 726–27.

We think this language applies with equal force to the instant situation. The fourth amendment bans "wholesale intrusions" upon personal security whether such intrusions stem from illegal arrests or from grand jury subpoenas ostensibly issued only because of the Government's bald statement that the witnesses are potential defendants. The fact that the investi-

gation in this case was conducted under the aegis of the grand jury does not excuse its unreasonableness. The dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*.

We agree with the Government's observation that the grand jury is not required to have a factual basis for commencing an investigation and can pursue rumors and clues which further investigation may prove groundless. The grand jury does not need probable cause to subpoena witnesses. But that is not to say that the grand jury may misuse its subpoena power to effect a seizure which in other contexts would be violative of the fourth amendment.

We reverse and remand to the district court with directions to vacate its contempt judgments and commitments.

A true Copy:
Teste:

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Clerk.

APPENDIX B

United States Court of Appeals For the Seventh Circuit, Chicago, Illinois 60604

(Monday, June 14, 1971)

Before

Hon. LUTHER M. SKYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, CIRCUIT Judge
Hon. OTTO KERNER, Circuit Judge
Hon. WILBUR P. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

Nos. 71-1155, 71-1157

[In the Matter of CHARLES BISHOP SMITH and ANTONIO DIONISIO, Witnesses Before the Special February 1971 Grand Jury]

ANTONIO DIONISIO AND CHARLES BISHOP SMITH, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

(On Petition for Rehearing)

On consideration of the appellee's petition for rehearing and suggestion that it be heard *en banc*

and the answers of the appellants filed in the above-entitled cause, a vote of the active members of the court was requested, and a majority of the active members of the court having voted to deny a rehearing and rehearing *en banc.*

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

Judges Cummings, Stevens and Sprecher voted to grant the petition for rehearing and the petition for rehearing *en banc.*

APPENDIX C

United States District Court, Northern District of Illinois, Eastern Division

In Re Albert Dini, a Witness Before the Special February 1971 Grand Jury

(NO. 71 GJ 466)

MEMORANDUM AND ORDER ON GOVERNMENT'S PETITION TO COMPEL VOICE EXEMPLARS

On behalf of the February 1971 Special Grand Jury, the United States Attorney petitions this court for orders directing certain witnesses to furnish exemplars of their voices. For the reasons stated below, this court is of the opinion the petitions should be granted.

The February 1971 Special Grand Jury is presently investigating possible violations of federal criminal statutes. Each witness who is the subject of these petitions has been called before the grand jury and has been fully advised that he or she is a potential defendant in its investigation. The grand jury has requested that each of these witnesses furnish voice exemplars, and each witness has refused to do so. The grand jury states that it needs these voice exemplars as a standard of comparison in order to identify voices intercepted by agents of the Federal Bureau of Investigation pursuant to orders entered by this court in 70 C 2510 and 70 C 2601. The witnesses here contend that to compel them to furnish such voice exemplars would violate their con-

stitutional rights under the Fourth and Fifth Amendments. This court does not agree.

THE FOURTH AMENDMENT

The witnesses are lawfully before the grand jury pursuant to subpoena. The Fourth Amendment prohibition against unreasonable search and seizure applies only where identifying physical characteristics, such as fingerprints, are obtained as a result of unlawful detention of a suspect, or when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. *E.g., Davis* v. *Mississippi,* 394 U.S. 721, 724–728 (1969); *Schmerber* v. *California,* 384 U.S. 757, 770–771 (1966). The voice exemplars sought clearly do not fall within the scope of an illegal search and seizure, and to compel these witnesses to furnish such evidence of physical characteristics in order to assist the grand jury does not violate their rights under the Fourth Amendment.

THE FIFTH AMENDMENT

The Fifth Amendment privilege against self-incrimination protects a suspect or accused from being compelled to testify against himself or otherwise provide the government with evidence of a testimonial or communicative nature. *Schmerber* v. *California,* 384 U.S. 757, 761 (1966). Voice Exemplars, just as handwriting exemplars or fingerprints, do not have testimonial or communicative qualities within the meaning of the Fifth Amendment. *Schmerber* v. *California, supra,* at 764. The Supreme Court has ruled that to compel a defendant to repeat certain words allegedly used in the perpretration of a crime for identification purposes does not violate his Fifth Amendment rights. *United States* v. *Wade,* 388 U.S. 218, 222–223 (1967).

See also Higgins v. *Wainwright,* 424 F.2d 177, 178 (5th Cir. 1970); *Schmidt* v. *United States,* 380 F.2d 22, 23 (5th Cir. 1967), *cert. den.* 390 U.S. 908 (1968). This court therefore, concludes that the orders sought do not violate these witnesses' rights against self-incrimination.

ADMISSIBILITY AT TRIAL

Several of the witnesses have raised objections on the grounds that voiceprints obtained from the voice exemplars in question would not be admissible evidence at trial. These objections are premature. The sole question before this court is whether such exemplars may be involuntarily obtained for use by the grand jury to assist them in investigating possible violations of federal law. A witness may not impede the collection of evidence by a grand jury, even if the issues he seeks to raise could later be successfully litigated by an indicted defendant. Whatever remedies are available to these witnesses, should they be indicted, with respect to allegedly tainted or inadmissible evidence do not affect the right of the grand jury to collect the evidence it now seeks. *C.f., United States ex rel. Rosado* v. *Flood,* 394 F.2d 139, 142 (2nd Cir. 1968).

The petitions requested by the United States Attorney on behalf of the September 1971 Special Grand Jury will therefore be granted, and orders will be entered accordingly.

/s/ EDWIN A. ROBSON,
Chief Judge.

FEBRUARY 19, 1971.

APPENDIX D

United States District Court, Northern District of Illinois, Eastern Division

IN RE ANTONIO DIONISIO, A WITNESS BEFORE THE SPECIAL FEBRUARY GRAND JURY

(No. 71 GJ 466)

JUDGEMENT AND COMMITMENT

On motion of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, for an order by the Court to enforce its order of February 19, 1971, heretofore entered in the above-entitled matter, the respondent, ANTONIO DIONISIO, appearing before the Court in person and counsel, and said respondent having admitted that he had refused and would continue to refuse to furnish voice exemplars before and to the SPECIAL FEBRUARY 1971 GRAND JURY, or to any duly appointed agent of said Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that respondent, ANTONIO DIONISIO, is in direct and continuing contempt of this Court for his failure to obey the order of this Court, dated February 19, 1971, heretofore entered herein.

IT IS THEREFORE ORDERED that respondent ANTONIO DIONISIO, be and he hereby is committed to the custody of the United States Marshal for

the Northern District of Illinois until such time as said respondent shall obey said order, or until the expiration of eighteen months.

Enter:

/s/ EDWIN A. ROBSON,
Chief Judge.

Dated: February 22, 1971.

APPENDIX E

United States District Court, Northern District of Illinois, Eastern Division

IN RE CHARLES BISHOP SMITH A WITNESS BEFORE THE SPECIAL FEBRUARY GRAND JURY

(No. 71 GJ 465)

JUDGMENT AND COMMITMENT

On motion of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, for an order by the Court to enforce its order of February 23, 1971, heretofore entered in the above-entitled matter, the respondent, CHARLES BISHOP SMITH, appearing before the Court in person and with counsel, and said respondent having admitted that he had refused and would continue to refuse to furnish voice exemplars before and to the SPECIAL FEBRUARY 1971 GRAND JURY, or to any duly appointed agent of said Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that respondent, CHARLES BISHOP SMITH, is in direct and continuing contempt of this Court for his failure to obey the order of this Court, dated February 23, 1971, heretofore entered herein.

IT IS THEREFORE ORDERED that respondent, CHARLES BISHOP SMITH, be and he hereby is committed to the custody of the United States Mar-

shal for the Northern District of Illinois until such time as said respondent shall obey said order, or until the expiration of eighteen months.

Enter:

/s/ EDWIN A. ROBSON,
Chief Judge.

U S. GOVERNMENT PRINTING OFFICE: 1971